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State v. Villavicencio Appellant's Reply Brief Dckt. 42198

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 42198
Plaintiff-Appellant,)	
)	Elmore Co. Case No.
vs.)	CR-2005-2654
)	
JOSE LUIS VILLAVICENCIO,)	
)	
Defendant-Respondent.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ELMORE

HONORABLE LYNN G. NORTON
District Judge

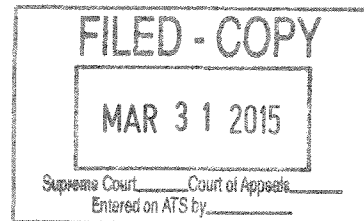
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ARGUMENT

The District Court Erred Under Rule 11 When It Corrected Villavicencio's Illegal Sentence In A Way That Vitiating The Parties' Binding Plea Agreement

A. Introduction

In September 2005, to resolve three separate criminal cases, Villavicencio entered into a global binding Rule 11 plea agreement with the state. (See R., pp.44-45.) The parties agreed that (1) Villavicencio would plead guilty to two counts of possession of a controlled substance and violating a no contact order; (2) the state would dismiss the remaining counts and cases against Villavicencio; (3) Villavicencio would receive consecutive sentences on each felony count of five years with one and a half years fixed, for a total sentence of ten years; (4) the district court would retain jurisdiction for 180 days; and (5) upon successful completion of the period of retained jurisdiction, Villavicencio would be placed on probation for a period of ten years. (*Id.*) The district court accepted the parties' agreement and so bound itself to the plea agreement. (R., p.48.)

Following the period of retained jurisdiction, the district court introduced a factual mistake into the proceedings when it misremembered that Villavicencio's underlying sentences had been *concurrent*, rather than *consecutive*. (Compare 3/6/2006 Tr., p.7, Ls.4-10 with R., pp.42, 45.) It therefore incorrectly placed Villavicencio on *concurrent* periods of probation, each for ten years, in its effort to comply with the parties' binding plea agreement, assuming that any error would be invited and so unchallengeable. (R., pp.97-103; 3/6/2006 Tr., p.7, L.4 – p.9, L.2.) When Villavicencio violated his probations seven and a half years later, he filed a Rule 35 motion to correct his sentence. (R., pp.208-10.) The district court (with a new judge presiding) determined that the

sentence was illegal and, rather than correct the sentence to reflect the parties' binding plea agreement, entered an order reducing Villavicencio's term of probation on all counts to seven years. (R., pp.256-59.)

The state appealed from the district court's order, arguing that it erred by "correcting" Villavicencio's sentence in a way that in fact vitiated the parties' binding plea agreement. (Appellant's brief, pp.4-9.) The court should have *corrected* the sentence, not *negated* the plea agreement. In response, Villavicencio argues that the district court lacks subject matter jurisdiction to correct Villavicencio's sentence in a way that would comply with the binding plea agreement. (Respondent's brief, pp.6-14.) Villavicencio's argument fails. Jurisdiction is conferred by operation of statute or rule; Rule 35, by authorizing a court to correct an illegal sentence, allows the court the necessary jurisdiction to, in fact, correct the sentence. The district court's order should be vacated and this case remanded for resentencing consistent with the parties' binding Rule 11 plea agreement.

B. Standard Of Review

"Whether a plea agreement has been breached is a question of law to be reviewed by the Court *de novo*, in accordance with contract law standards." State v. Jafek, 141 Idaho 71, 73, 106 P.3d 397, 399 (2005) (citation omitted).

C. The District Court Has Sufficient Jurisdiction To Correct Villavicencio's Sentence In A Way That Implements The Parties' Plea Agreement

A plea agreement is contractual in nature and must be measured by contract law standards. State v. Lampien, 148 Idaho 367, 376, 233 P.3d 750, 759 (2010). When the court accepts the parties' binding plea agreement under Rule 11, the court is required to

“implement the disposition provided for in the plea agreement.” I.C.R. 11(f)(3). In its opening brief, the state conceded that Villavicencio should not have been placed on “concurrent probations” for a period of ten years; that sentence was based on a mistake of fact, was illegal, and needed to be corrected. (See Appellant’s brief, pp.4, 6-7.) However, the condition that Villavicencio serve ten years of probation was not itself illegal and could have been accomplished through legal means. (Id.) Because that condition was part of the binding Rule 11 plea agreement, the district court was required to correct Villavicencio’s sentence in a way that implemented that term. Because the district court instead vitiated that condition and rendered the agreement inoperable, the district court erred and should be reversed.

On appeal, Villavicencio contends that the district court lost jurisdiction over his case and therefore lacks legal authority to correctly structure his sentence consistent with the parties’ binding plea agreement. (Respondent’s brief, pp.6-11.) Seeking support for this argument, Villavicencio relies on State v. Kesling, 155 Idaho 673, 315 P.3d 861 (Ct. App. 2013). In Kesling, the Court held that statutes which extend a court’s jurisdiction for purposes of probation do not extend that jurisdiction beyond the maximum term of probation. Id. at 677, 315 P.3d 865.

Kesling is not dispositive for two reasons. First, while the state recognizes that probation cannot exceed “the maximum period for which the defendant may be imprisoned,” I.C. §§ 19-2601(7), 20-222, multiple terms of probation can lawfully be run consecutively. State v. Horejs, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006). Villavicencio was convicted of two counts of possession of methamphetamine and a violation of a no contact order. The maximum period of probation which could be

ordered for these crimes is not seven years, as Villavicencio claims on appeal. (See Respondent's brief, p.8.) Rather, it is 16 years—seven years for the possession of methamphetamine in Case No. CR-2005-2654, I.C. § 37-2732(c)(1); seven years for the possession of methamphetamine in Case No. CR-2004-2777, *id.*; and two years for violating a no contact order in the latter case, I.C. § 19-2601(7). Because it is lawful to run all of these probations consecutively, the court was well within the maximum term of probation available and may appropriately restructure Villavicencio's sentence to reflect and implement the parties' binding plea agreement.

Second, though Villavicencio asserts that his case is “virtually indistinguishable” from Kesling (Appellant's brief, p.10), he overlooks one major distinction: Unlike in Kesling, Villavicencio's sentence was arrived at through a binding Rule 11 plea agreement. The provision that Villavicencio serve a ten year term of probation, especially within the framework of that agreement which provided for consecutive underlying sentences of five years each, is legal. Because it is legal and was accepted by the court, it is mandatory for the court to implement the provision. I.C.R. 11(f)(3). And, where provisions are mandatory, a court is even authorized under Rule 35 to increase a sentence if necessary to correct it. State v. Steelsmith, 153 Idaho 577, 582, 288 P.3d 132, 137 (Ct. App. 2012).

Villavicencio also asserts, contrary to precedent, that he is entitled to benefit from his plea agreement while depriving the state of its reciprocal benefits. (Respondent's brief, p.11.) To support this proposition, Villavicencio relies on State v. Armstrong, 146 Idaho 372, 195 P.3d 731 (Ct. App. 2008). Villavicencio's reliance is misplaced. In Armstrong, the defendant entered into an initial plea agreement with the state in which

the state agreed not to request a psychosexual evaluation prior to sentencing. Id. at 373, 195 P.3d at 732. Later, Armstrong's probation officer requested Armstrong to submit to a psychosexual evaluation. Id. When he refused, the probation officer brought a probation violation allegation against him. Id. Armstrong claimed that requiring him to participate in the psychosexual evaluation violated his plea agreement and asserted that he should be allowed to withdraw the plea agreement. Id. The district court determined that the state had not violated the plea agreement, but "in fairness," still permitted Armstrong to withdraw. Id.

The parties entered a second plea agreement. Id. Following a period of retained jurisdiction, the court ordered a term of probation that exceeded the term agreed to in the second plea agreement and Armstrong appealed. Id. The Court, however, found that the district court lacked jurisdiction to allow Armstrong to withdraw his guilty plea in the first place because Idaho Criminal Rule 33 does not include any provision extending the jurisdiction of the district court. Id. at 377-78, 195 P.3d at 736-37. The Court therefore vacated the second order placing Armstrong on probation and enforced the parties' initial plea agreement. Id. at 378, 195 P.3d at 737.

The Court's holding in Armstrong does not appear relevant to this case. Unlike Rule 33, Idaho Criminal Rule 35 *does* extend the court's jurisdiction to "correct a sentence that is illegal from the face of the record *at any time*." I.C.R. 35(a) (emphasis added); see also State v. Jakoski, 139 Idaho 352, 355 n.5, 79 P.3d 711, 714 n.5 (2003) (recognizing that Rule 35 extends a court's jurisdiction to permit a motion to correct an illegal sentence at any time). Because Rule 35 extends the court's jurisdiction, the court has jurisdiction to actually correct the sentence.

Ultimately, Villavicencio's argument is that Rule 35 affords the court sufficient jurisdiction to provide him with his preferred remedy, but insufficient jurisdiction to even consider the state's requested remedy. Because Rule 35(a) gives the court authority to correct an illegal sentence, it gives the court jurisdiction to actually correct the sentence. The district court has jurisdiction to correct Villavicencio's illegal sentence and must exercise its authority to correct that sentence in a way that implements the parties' binding Rule 11 plea agreement.


Villavicencio's sentence was illegal. The parties do not dispute that the district court structured Villavicencio's sentence in an unlawful way. The parties also do not appear to dispute that the agreed-to provision, that Villavicencio be placed on probation for a period of ten years, could have been imposed lawfully. The only question before the Court is, what is the appropriate remedy to correct the illegal sentence? Because Rule 11 obligates the district court to "implement the disposition provided for in the plea agreement," the court must correct Villavicencio's sentence in a manner consistent with the agreement. The proper remedy under Rule 35 is to correct the sentence, not to negate the plea agreement.

Because the district court's order violates Rule 11 and vitiates the parties' binding plea agreement, it should be reversed and this case remanded for further proceedings.

CONCLUSION

The state respectfully requests that this Court vacate the district court's amended judgment and remand this case for resentencing consistent with the parties' binding Rule 11 plea agreement.

DATED this 31st day of March, 2015.




RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of March, 2015, served a true and correct copy of the attached REPLY BRIEF OF APPELLANT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm